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June 9, 1997

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 96-262 & 94-1

Dear Mr. Caton:

Enclosed for filing in the above-captioned matter, please find an original and four copies of the "Opposition of MCI to the Joint Petition for a Partial Stay."

If you have any questions, please do not hesitate to call me at 202-639-6095.

Sincerely,

DBV

Donald B. Verrilli, Jr.

RECEIVED

JUN - 9 1997

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review	)	**CC Docket No. 94-1**
for Local Exchange Carriers	)	

OPPOSITION OF MCI TO THE JOINT PETITION FOR A PARTIAL STAY

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June 9, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review for Local Exchange Carriers	)	**CC Docket No. 94-1**

OPPOSITION OF MCI TO THE JOINT PETITION FOR A PARTIAL STAY

EXECUTIVE SUMMARY

MCI Telecommunications Corporation ("MCI") opposes the request of Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company ("Petitioners") for a stay of this Commission's First Report and Order in CC Docket No. 96-262, Access Charge Reform and Second Report and Order in CC Docket No. 94-1, Price Cap Performance Review for Local Exchange Carriers.

These decisions represent a first step toward reducing access charges to appropriate cost-based levels -- a necessary reform that has already been delayed more than a decade, while consumers have been forced to pay billions of dollars in excess charges. Although compelling arguments can be made that those initial efforts do not go far enough, no credible argument can be made that they go too far. Indeed, there is no justification in law, equity or public policy for blocking the Commission's initial efforts to bring access charges into line.

Petitioners are not entitled to the "extraordinary remedy"[1/] of a stay because they cannot show: "(1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if the stay is not granted; (3) that other interested parties will not be harmed if a stay is granted; and (4) that the public interest favors the grant of a stay."[2/] As will be demonstrated, none of those factors favors a stay here. At the outset, however, it is appropriate to note that petitioners' entire case for a stay rests on three insupportable points.

First, petitioners have not even remotely demonstrated that the Commission made a "clear error of judgment" in reducing access charges to the extent it did. See Bell Atlantic Telephone Companies v. FCC, 79 F.3d 1195, 1202 (D.C. Cir. 1996) (quotation omitted). Their principal argument (which attacks only a small part of the orders at issue) rests on the entirely insubstantial claim that the Eighth Circuit's provisional order staying the Commission's § 251 rules respecting intrastate rates in Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996), bars the

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[1/] Cincinnati Bell Telephone Company, Requests for Stay of Orders Finding Violations of the Commission's Rate of Return Prescriptions, 8 FCC Rcd 6709, 6709 (Com. Car. Bur. 1993).

[2/] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 11754, 11756 (1996), citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

Commission from changing interstate access charges in these proceedings. Petitioners' remaining challenges are all to the adequacy of the Commission's explanations for its actions, not to the substantive legality of the actions themselves -- and those arguments are equally meritless.

Second, even if petitioners could demonstrate that the orders they challenge lack an adequate explanation, they would not be entitled to judicial relief invalidating the Commission's actions and restoring the prior access charge regime. The proper remedy in such an unlikely event would be a remand that left the orders in place while the Commission supplied whatever additional explanation was needed. See ICORE, Inc. v. FCC, 985 F.2d 1075, 1081 (D.C. Cir. 1993) ("This and other federal circuit courts have repeatedly found it appropriate to remand an agency action without vacating it" when all that was lacking was an adequate explanation of a rate order within the agency's authority); accord Commonwealth of Massachusetts v. NRC, 924 F.2d 311, 336 (D.C. Cir. 1991); International Union, UMW v. FMSHA, 920 F.2d 960, 967 (D.C. Cir. 1990); Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir. 1975); Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980). Thus, the supposition critical to petitioners' plea for extraordinary relief -- that they will be entitled to continue to collect access charges calculated under prior Commission orders -- is simply wrong.

Third, petitioners' argument that they will be irreparably harmed is critically dependent on the highly speculative (and we believe insupportable) assumption that local competition is about to explode across the country, thereby precluding the normal mechanism of future upward adjustments in the price cap rules should such adjustments prove necessary to allow recoupment. Petitioners introduce no evidence to support such speculation, and all indications are to the contrary (see pages 27-28 infra).

Indeed, petitioners' injury argument depends on an exquisite fortuity of timing. As petitioners would have it, local competition will not develop fast enough to preclude them from charging maximum rates during the pendency of judicial review, but will miraculously spring into being when review is concluded and thereby prevent recoupment under an adjusted price cap formula if petitioners eventually win on the merits. Such an implausible scenario hardly constitutes the kind of clear and convincing showing of irreparable harm required for a stay.

Finally, even if the scenario were minimally plausible, it is at least doubtful whether petitioners would suffer a legally cognizable injury from being forced to surrender a small part of their monopoly profits while competition is taking hold. The Commission would have been wholly justified in prescribing a rapid reduction of access charges to the competitive level. The changes at issue here were only a small step in that direction. And if petitioners are right that vibrant local competition is imminent, then the market forces about which they lament will force access charges down irrespective of whether petitioners ultimately prevail on their challenge. Not even petitioners claim a right to be insulated from such competition. In fact petitioners encouraged the Commission to rely exclusively on competition to reduce access charges. They cannot now complain about a Commission action that produces less reform than would the competition they purport to endorse. All petitioners ultimately seek is the ability to exploit the delay in the development of local competition by charging access charges at unjustifiable past levels.

Such a result would doubtless enrich petitioners, but consumers will continue to pay inflated charges that cannot be justified on any plausible public policy ground. Their long distance rates will be higher, and their ability to make long distance calls with thus be reduced. The accounting order petitioners propose does not eliminate that harm -- it perpetuates the harm. If petitioners' approach were adopted, today's consumers would suffer the harms of inflated access charges, while a different set of future customers would reap a windfall when the escrowed charges are disbursed. See WorldCom Inc. v. FCC, 20 F.3d 472 (D.C. Cir. 1994).

Petitioners further seek to deny consumers the benefits of local competition by demanding the right to collect access charges in connection with the leasing of unbundled elements to new entrants -- a result which would substantially raise the costs of new local rivals, and impair their ability to bring lower prices to consumers.

Thus, in every respect, the public interest weighs decisively against granting a stay.

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INTRODUCTION AND SUMMARY

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Commission from changing interstate access charges in these proceedings. Petitioners' remaining challenges are all to the adequacy of the Commission's explanations for its actions, not to the substantive legality of the actions themselves -- and those arguments are equally meritless.

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Petitioners further seek to deny consumers the benefits of local competition by demanding the right to collect access charges in connection with the leasing of unbundled elements to new entrants -- a result which would substantially raise the costs of new local rivals, and impair their ability to bring lower prices to consumers.

Thus, in every respect, the public interest weighs decisively against granting a stay.

I. PETITIONERS HAVE NO REALISTIC PROSPECT OF SUCCESS ON THE MERITS

None of petitioners' three attacks on the Commission's orders offers any prospect of success on the merits.

A. The Commission Properly Refused To Impose Additional Charges Over And Above Cost-Based Rates For Unbundled Network Elements.

Petitioners' principal argument for a stay -- the alleged conflict between the access charge order and the Eighth Circuit's stay ruling[3/] -- raises no question about the substantive validity of the orders petitioners challenge, and calls into question only a small portion of those orders. That petitioners would choose to lead with such an argument speaks volumes about the strength of their case.

Petitioners argue that the Commission's decision to preclude incumbent local exchange carriers (ILECS) from collecting Part 69 interstate access charges from purchasers of unbundled network elements is in conflict with the Eighth Circuit's stay ruling. That is not so. The Eighth Circuit stayed the pricing aspects of the Interconnection Order based solely on a provisional conclusion that the Commission lacked jurisdiction to regulate intrastate prices. Iowa Utilities

[3/] See Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996).

Board v. FCC, 108 F.3d at 425 ("petitioners have demonstrated that they will likely succeed on the merits . . . based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service") (emphasis added). The access charges at issue here are, of course, interstate rates. The Commission's jurisdiction over such rates is unquestioned. Certainly, nothing in Eighth Circuit's opinion calls the Commission's authority over such rates into question.

Whether or not the Eighth Circuit's provisional interpretation of the Commission's authority under 47 U.S.C. § 251 to make rules regarding intrastate rates was correct -- and it was wrong -- no plausible argument can be made that the Commission lacked statutory authority to amend the Part 69 access charge rules, or that the Eighth Circuit's provisional ruling forbids them from doing so. The particular stayed rule to which petitioners point, § 51.515, precluded charging both interstate and intrastate access charges in connection with the leasing of unbundled elements. The Eighth Circuit obviously stayed that rule because it expressly addressed both. Nothing in that ruling precludes the FCC from issuing an order addressing solely interstate access charges.

Petitioners' reliance on § 254 of the Act to challenge access charge reforms is particularly inappropriate. As petitioners would have it, the Commission may not eliminate Part 69 access charges in connection with unbundled elements until it first determines exactly how much of the access charge excess in fact subsidizes universal service. But it cannot plausibly be asserted that the Commission's decision will jeopardize the funding of universal service, and petitioners do not offer such a rash assertion. There is no reasonable short-term prospect of leasing of unbundled elements on a scale that would generate material reductions in access revenues to the ILECs. Moreover, petitioners do not quantify the contribution over economic cost that they claim access charges make to universal service support, and without such a showing they fail to carry their burden of demonstrating that they should be permitted to continue to recover the excess charges.[4/]

Nor is there any merit to petitioners' charge that it is discriminatory for the Commission to allow access charges in connection with resale while precluding ILECs from collecting them in connection with unbundled elements. The complete answer to that charge is contained in ¶ 340 of the Access Charge Order, which explains the "major differences between competition through the use of unbundled network elements and competition through resale." In particular, "an entrant relying on unbundled elements rather than resale has the flexibility to offer all telecommunications services made

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[4/] Petitioners have not even attempted that past access charge reductions (which totalled over $ 2.7 billion) have had that result. See Tier I Compendium & Roll Up; USTA data submitted in CC Docket No. 94-1. Indeed, the average rate of return of the RBOCs, GTE and Sprint had climbed to 13.9 % by 1995. See FCC Forms 492A.

possible by using network elements but also assumes the risk that end users will not generate sufficient demand to justify the investment." Id. Petitioners disagree with that conclusion, but have failed to show why it is unreasonable or unsupported.

B. The Commission Fully Explained the Adjustment for Completing Equal Access Amortization

Equally spurious is petitioners' claim that the Commission failed to offer a sufficient justification for its decision to require an exogenous decrease in price caps reflecting the end of the amortization period for non-capitalized equal access expenses. The Commission's justifications, elaborated in sixteen paragraphs of the Access Charge Order, ¶¶ 299-314, offer persuasive reasons for the Commission's action -- reasons petitioners largely do not even dispute.

Petitioners' primary argument is a procedural one. They assert that, because the action at issue constitutes a change from decisions made in prior proceedings, the Commission was required to offer an explanation pointing to new material in the current record that "caused it to change its mind." Joint Petition, at 13; see id. at 14 ("The key failure in each of these arguments is that they do not rely upon the current record") (Emphasis in original). They add that "[t]aken at face value," the Commission's action seems to be based "primarily . . . upon the past record," id. (emphasis in original), and complain that "[u]nder this type of analysis, no Commission decision appears to be safe as the

Commission apparently feels free to reopen any issue, at any time, without any new evidence being required," id.

This argument bears no relation to the governing law. Petitioners cite the requirement, set forth in Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 57 (1983), and Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), that an agency changing its mind about an issue must "supply a reasoned analysis." Joint Petition, at 13, 14 n. 26. But nothing in those cases or any other supports their claim that such a "reasoned analysis" must be based on new evidence reflected only in a current administrative record. Agencies need to have, and do have, the authority to change their minds about an issue, as long as they explain their reasons for doing so.

That standard certainly was met here. The issue was thoroughly debated by parties to the proceedings.[5/] The Commission explained in detail why it had decided to depart from its prior stance of refusing to adjust price caps downward to reflect the end of the amortization period for non-capital equal access expenses. The Commission noted that some of those prior determinations reflected more the procedural posture of a given docket than a view on the merits. Access Charge Order, at ¶ 306. The Commission went on to point out that the Commission had not previously

[5/] AT&T Comments in CC Docket No. 94-1 (May 9, 1994) at 47-48; SBC Reply Comments (June 29, 1994) at 79-80; Pactel Reply Comments (June 29, 1994) at 54-55. See also MCI Comments in CC Docket No. 94-1 (May 9, 1994) at 47-48.

analyzed the issue in depth. ¶ 307. It explained that, if the rate-of-return system had remained in place, the end of the amortization period for this cost would have automatically been reflected in current rates, but that the price cap system prevented such an automatic adjustment. ¶¶ 304-310. It recognized that, for that reason, it had previously ordered exogenous decreases relating to two other analogous forms of amortized expenses -- depreciation reserve deficiencies and inside wire costs. ¶ 310. The Commission then concluded that

> an exogenous decrease is necessary in order to adjust the price caps for the completed recovery of the specified equal access non-capitalized expenses that we required to be amortized over an eight-year period. Because the current price cap index includes an expense that has now been completely recovered, the price cap should be adjusted downward to account [for] its recovery. Simply stated, we find that ratepayers should not be forced to pay for a cost that, were it not for the way price cap regulation occurred in this instance, they would no longer be paying.

Access Charge Order, at ¶ 311.

Remarkably, petitioners do not even assert that there is anything wrong with the Commission's substantive analysis of this issue. Their only argument -- aside from their baseless procedural point -- is that allowing a decrease based on the end of the amortization period for equal access expenses cannot be "reconcile[d]" with the fact that "LECS that incur equal access costs subsequent to the implementation of price caps are not allowed to make an automatic upward exogenous adjustment." Joint Petition, at 14-15.

This argument simply mixes apples and oranges. As the Commission explained, in a portion of its decision that petitioners do not even acknowledge, the costs at issue here were very high, one-time expenses associated with the start-up of equal access. These costs were separated out and amortized because, "if allowed to be imposed in the normal fashion, [they] would have resulted in huge rate fluctuations." Access Charge Order, at ¶ 312. Once the amortization process was complete, absent an exogenous adjustment, price caps would have been permanently skewed upward. By contrast, "the ongoing costs of providing equal access [are] part of the normal costs of providing telephone service." Id. "Exogenous treatment of these costs is unnecessary," id., because they are already reflected in the price cap rates, which were originally based on the rate-of-return rates in effect on July 1, 1990. See id. ¶ 303.

Petitioners have offered nothing to suggest that the Commission's determination on this issue is legally questionable.

C. Petitioners Present No Legitimate Challenge to the Commission's Selection of the X-Factor

Petitioners have no realistic hope of challenging the Commission's calculation and application of the X-Factor. Joint Petition, at 15-20. Insofar as petitioners assert that the X-Factor should have been established at a lower level, their claims are meritless. To the contrary, the X-Factor should have been set at a substantially higher level.[6]

1. Petitioners Are Incorrect in Claiming the Commission's Review of the Record Was Selective.

The record included three proposed TFP models (Ad Hoc, AT&T and USTA) for calculating the productivity component of the X-Factor.[7] The Commission also presented its own calculation (the "Staff estimates"). Price Cap Performance Review Order, at ¶ 137. The Commission rejected the Ad Hoc and USTA models as flawed.[8] Accordingly, the selection of the appropriate X-Factor was based primarily on the Staff estimates and the AT&T model. Id.

The Commission examined these X-Factor estimates for each year from 1986 through 1995. It also examined the average calculated X-Factors for the periods 1986-1995, 1987-1995, 1988-1995, 1989-1995, 1990-1995 and 1991-1995. Id., at ¶ 138. Based on all of this information, the Commission determined that a "reasonable, challenging productivity"

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[6] MCI advocated a higher X-Factor than that selected by the Commission, and MCI reserves the right to seek reconsideration or review of the Commission's order in this respect. The complaints presented by Petitioners here, however, are meritless.

[7] Petitioners do not challenge the Commission's decision to use a total factor productivity ("TFP") method in calculating the appropriate X-Factor.

[8] With respect to the Ad Hoc model, see Price Cap Performance Review Order, at ¶ 38, 137. The USTA model was rejected primarily because it used an inappropriate measure of the input price differential. Id. at 137.

component of the X-Factor would lie within a range between 5.2 percent and 6.3 percent.[9]

The Commission then determined that the X-Factor should be set at the upper end of this range.[10] Accordingly, the Commission selected 6.0 percent as the appropriate productivity component of the X-Factor.

Petitioners argue that the Commission was bound to base its X-Factor solely on data from the years of LEC price cap experience, and could give no weight to data prior to 1990. They fail, however to present any authority or rationale for this artificial limitation.[11]

Indeed, petitioners' own earlier comments flatly contradict their present effort to limit the Commission to the 1990-1995 period. Southwestern Bell urged that the X-Factor reflect a "[l]ong-[t]erm [t]rend rate of [g]rowth" and

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[9] The 5.2 percent figure matches the Staff estimate of the average productivity component for the period 1986-1985 and for the period 1991-1995. The 6.3 percent matches AT&T's estimate of the productivity component for the period 1991-1995.

[10] Its reasons for this choice, which stand unchallenged by Petitioners, were that: (a) over time the LECS have consistently achieved productivity growth near or above the upper end of the range identified by the Commission; (b) there appears to be a strong upward trend in productivity growth from 1992 to 1995; and (c) AT&T's estimates of total company productivity were above the upper limit of the Commission's range. Price Cap Performance Review Order, at ¶ 141.

[11] The Commission did place greater weight on data from the more recent price cap years. The series of averages it chose to rely upon gave "the least weight to the oldest estimate, because that estimate only appears in the first average, and the most weight to the most recent five estimates, because these estimates appear in every average." Price Cap Performance Review Order, at ¶ 138.

observed that "SWBT has consistently recommended that a period of at least eight years be used to determine a reliable productivity trend."[12/] Pacific and Nevada Bell, similarly, supported one TFP model because the "eight year period studied . . . adds to the validity of the results."[13/] It is impossible to reconcile these statements with petitioners' current claim that the Commission could rely only on the six years of data from 1990-1995.

Nor do the Commission decisions cited by petitioners even vaguely support the notion that the X-Factor must be based exclusively on the experience since 1990. Petitioners cite the 1994 Notice of Proposed Rulemaking in this Docket for the proposition that "the critical element . . . in X-factor analysis, is actual LEC performance under price caps."[14/] Upon examination, however, the cited portion of the NPR states clearly that the Commission intends to examine "all available data and information" to review the impact of price caps.[15/]

12/ Comments of Southwestern Bell Telephone Company, CC Docket No. 94-1, at 38 (filed May 9, 1994).

13/ Comments of Pacific Bell and Nevada Bell, CC Docket No. 94-1, at 31 (filed May 9, 1994).

14/ Notice of Proposed Rulemaking, Price Cap Performance Review for Local Exchange Carriers, 9 FCC Rcd 1687, 1688 (1994) (mis-cited in the Joint Petition as 9 FCC Rcd. at 1288).

15/ Id. at 1688, ¶ 9. The Commission notes that the NPR will "summarize information collected by the Commission in monitoring the course of LEC performance since price cap tariffs took effect on January 1, 1991." Id. This language hardly suggests, however, that this is the only data that may be considered.

Petitioners also cite the First Report and Order in this docket for the proposition that the "best indication of potential LEC productivity gains is actual LEC productivity under incentive regulation."[16] But this decision hardly suggests that pre-1990 data may not even be considered by the Commission. To the contrary, it contains extensive discussion of pre-1990 data as evidence of the appropriate X-Factor.[17]

Actual productivity increases under the price caps are obviously important information in identifying a reasonable X-Factor. But the Commission need not ignore data from earlier years. The record in this proceeding contains substantial support for the Commission's chosen course of examining all available data, while giving added weight to that from the price cap years.[18]

Petitioners are equally incorrect in arguing that the Commission "rejected" a 5.2 percent productivity factor as distorted by the 1992 data. See Joint Petition, at 16-17. To the contrary, the Commission found evidence to support 5.2

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[16] Joint Petition, at 16 & n.30. Petitioners incorrectly attribute the language they rely upon to the LEC Price Cap Order. In fact, petitioners are relying on language that appears in Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd. 8961, 9047 (¶ 191), aff'd sub nom., Bell Atlantic v. FCC, 79 F.3d 1195 (D.C. Cir. 1996).

[17] See, e.g. Id. at ¶ 105 (discussing the Christensen study of the TFP for price cap LECs over the period 1984-1992); 116 (discussing USTA submission concerning LEC input prices and economy-wide input prices from 1949-1992).

[18] Each of the TFP models submitted (USTA, AT&T and Ad Hoc) relied on data that pre-dated the price cap experience.

percent as the low end of the range of reasonable X-Factors. Price Cap Performance Review Order, at ¶ 142. It then went on, for reasons that it fully explained, to set the upper limit of that range and to select the 6.0 percent productivity component from within that range. Petitioners are correct that the Commission noted concern that the measured TFP for 1992 appeared "to be an artifact of a one-year jump in the measured productivity of the national economy as economic activity increased, rather than a change in the growth rate of LEC productivity or input prices." Price Cap Performance Review Order, at ¶ 139. Cf. Joint Petition, at 16. Petitioners neither dispute this finding nor offer any evidence suggesting that it is in any way incorrect.

Petitioners do not identify any fact or argument the Commission failed to consider, nor any conclusion the Commission failed to explain.[19/] Accordingly, they have not demonstrated a likelihood they will succeed in challenging the Commission's selection of the productivity component of the X-Factor.

[19/] Petitioners observe that the Commission may not disregard pertinent facts in the record. Joint Petition, at 17. However, petitioners do not identify any fact or argument they believe the Commission failed to consider. To the contrary, petitioners' argument appears to be that the Commission recognized the 5.2 percent average X-Factor for the period 1990-1995, but erred in failing to adopt this as the permanent X-Factor. Cases like Tenneco Gas, which concern whether the agency actually examined the relevant facts and arguments, appear inapposite to petitioners' position.